HOW TECHNICALLY SAVVY IS YOUR LEGAL COUNSEL?

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Abstract: Recently, a research project was conducted to evaluate how mid-sized manufacturing companies handle e-mail retention. Since the risks associated with e-mail retention are related to compliance and litigation issues, the study examined recommendations from legal counsel regarding electronic mail retention. Analysis of data from this recent survey conducted to evaluate recommendations for electronic mail retention policies suggests corporate counsels may not be providing their clients with recommendations that are consistent with advice given by experts in electronic discovery. The survey responses indicate that attorneys may be relying on technical managers to provide electronic mail retention methods, without incorporating input from legal experts with regard to issues such as an audit trail for e-mail, or a formal electronic records retention software system.

Keywords: electronic discovery, electronic mail retention, legal counsel

1. Introduction

There are numerous areas of expertise in the legal profession. Attorneys may specialize in criminal defense, family law, one of the many subfields of commercial law, or any of hundreds of other specialties. While each of these areas requires specialized knowledge, almost all of them are evolving to require attorneys to understand commonly adopted technology, along with the legal issues in each specialty. One of the most widely used communications technologies, electronic mail (e-mail), is coming into play in lawsuits. Who said what, in an e-mail, to whom, and when, is relevant in many court cases.

With amendments to the Federal Rules of Civil Procedure (FRCP) that went into effect in late 2006, electronic discovery preparedness and viable electronic document retention policies are critical to reducing risk in business operations. Hope Haslam, legal counsel and director of consulting services at Eqip Systems compares the level of preparation in many companies to a game of Russian roulette.[2] If an organization is not prepared to deal with electronic discovery requests effectively, the potential costs in litigation can be much greater than the costs of implementing an appropriate records retention system.

Analysis of data from a recent survey conducted to evaluate recommendations for electronic mail retention policies suggests corporate counsels may not be providing their clients with recommendations that are consistent with advice given by experts in electronic discovery. Responses from corporate attorneys allowed the researcher to conclude that their level of technical understanding of electronic mail storage mechanisms appears to be less mature than expected, and infer that clients in manufacturing industries may not be getting advice based on the most current technology from their legal counsel.

2, What Level of Technical Expertise should be expected of Corporate Counsel?

As technology changes, organizations may adopt technical tools at various stages of the technology's maturity. Electronic mail is one technology that has reflected this rapid change in features and function over the past decade. Early adopters of this technology found its usefulness limited because connectivity was limited to internal networks and the ability to send attachments did not exist. As the technology improved and Internet access was added, organizations had to address other issues such as whether the recipient actually received the message and whether they could open attachments from different word processing programs. Further improvements in e-mail have provided numerous features and configurations that can be tailored to meet the needs of diverse types of

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[2] Melanie Rodier (June 1, 2008). E-Discovery Headaches; Despite the penalties for inadequate e-discovery capabilities, many firms are still challenged to establish effective programs. Wall Street and Technology. Rodier discusses some possible reasons for legal counsel's lack of willingness to attain outside experts in establishing electronic document retention policies.

organizations. E-mail can be stored on a server permanently, or stored temporarily on a server then sent to the user's computer (client). These changes in functionality over time, along with the addition of many configuration options have added complexity to the legal implications of electronic communication.

Some questions that may need to be answered in the midst of legal proceedings may be:

- Who has a copy of an e-mail?
- Who sent the original message?
- When was the e-mail sent and when was it received?
- How long was the message kept by the sender and receiver?
- Were the activities related to this message governed by policy of the organization?

The answers to these and other questions will be different for every setting, based on organizational policy, configuration, and the specific technology used for e-mail. This complexity and variety of potential configurations poses problems for legal counsel. Can an attorney be expected to understand all of the nuances and technicalities of his area of practice, as well as the intricacies of electronic mail? Unfortunately, because so much of the discovery process is shifting to examination of electronic documents, the answer for many clients is "yes".

3. Differences in Technology Use

An organization's use of technology varies with size and industry sector. For example, a large organization is much more likely to depend on sophisticated technology than a small organization. A company that operates in multiple locations must provide information systems that meet operational, reporting, and communication needs in a way that a smaller, single location firm would not need to provide.

The industry sector of a firm also has an impact on how the firm uses technology. Consider a service-oriented firm such as a bank. Banks rely on computers, communications technology, and machines such as automated tellers to perform almost every task in the organization. Banks of any size must be concerned with security issues such as access to electronic records, authentication, and fraud. They must insure that systems will handle the transaction volumes with acceptable response times, and provide the appropriate level of detail for various transactions to customers and employees.

The requirements for service-oriented firms differ from other firms. Retail firms, government organizations, healthcare organizations, schools, military concerns, transportation firms, and manufacturing firms each have unique requirements for computer systems. These requirements differ in sophistication on numerous levels. In different industries the level of protection for sensitive data varies. Other differences include:

- the geographic distance between operational locations,
- the expected retention time for records,
- the level of access for internal and external entities,
- the potential for health and safety concerns, and
- the level of government regulation in recordkeeping.

In the manufacturing sector, organizations typically have a high level of sophistication in computer applications related to machine control such as robotic equipment, production machine control, and production scheduling systems. In smaller manufacturing firms, there may be less emphasis on information systems issues such as record retention and more effort focused on the technology needed to manage key business activities such as production.

4. Research Project

The evolving area of electronic discovery in litigation is complicated by the diverse technologies available and the differences in how various industries approach technology use described above. Even with the emphasis on electronic discovery in legal journals and other publications, training and continuing education opportunities, legal precedents and court decisions, companies in litigation involving e-mail discovery continue to make expensive errors during the litigation process and in the risk assessment stage prior to litigation. Examples include the January, 2008 ruling in U.S. District Court by Judge Barbara L. Major which required Qualcomm to pay an $8.5 million penalty for failing to produce e-mail relevant to a patent lawsuit against Broadcom and other expensive

judgments and settlements.[3] Empirical research is needed to evaluate various industry sectors and how electronic discovery should be addressed in each environment. Recently, a research project was conducted to evaluate how mid-sized manufacturing companies handle e-mail retention. Since the risks associated with e-mail retention are related to compliance and litigation issues, the researcher chose to examine recommendations from legal counsel regarding electronic mail retention. For purposes of the research project mid-sized manufacturing companies were defined as companies identified as manufacturing concerns by the North American Industrial Classification System (NAICS) with annual revenues between $50 million and $500 million.

Candidate companies were identified using the Gale Business and Company Resource Center database. After the listing of candidate companies was produced, the *Standard and Poor's Register of Corporations Directors and Executives United States and Canada* [4] was consulted to find the name of the primary corporate counsel for the candidate companies. In many cases, no corporate counsel was listed, and in several cases the same corporate counsel represented more than one candidate company. The attorney or firm listed as corporate counsel was invited to participate in the survey.

The researcher used Dillman's [5] Tailored Design Method (TDM) with modifications suggested by Dennis [6]to conduct the survey. The major modification to TDM was to omit a pre-notification from the protocol. The survey consisted of a questionnaire sent via U.S. mail, a follow-up postcard, and replacement questionnaire sent via U.S. mail for subjects who had not responded to the first round of questionnaires. Participants were offered an executive summary of the results of the study as an inducement to participate.

The initial and replacement surveys included a letter of introduction on Texas A&M-Texarkana, College of Business letterhead, to explain the project and solicit responses. The survey included 22 questions and space for respondents to request the executive summary and provide contact information. The number of active companies in the population of the study was 35,913. At a confidence level of 95% the confidence interval for individual questions ranged from 9.74 to 11.54.

5. Responses to Research Questions by Corporate Counsels

Although the survey focused on e-mail retention, many of the questions were framed in such a way that inferences about the technical expertise of corporate counsel could be made based on the responses. The results presented here focus on those questions and what they reveal about the likely technical expertise of the corporate counsels in the study.

The survey question that most clearly highlights the issue of technical competence levels for legal counsel was, "Who is responsible for creating an e-mail policy for the company?" The possible responses included a records manager, legal counsel, IT manager, and other. Multiple selections were possible. 67% of the participants indicated that the IT manager was responsible and 40% of the participants indicated that legal counsel was responsible (many respondents selected both). 23% of the participants indicated that the IT manager alone is responsible for creating an e-mail policy. This response seems to indicate that legal counsel may be involved with e-mail policy, but in many cases, the IT manager plays a major role in developing the e-mail policy.

Research and advice related to electronic mail policy, is available from a variety of sources. One credible source of information related to electronic discovery is The Sedona Principles: Second Edition, Best Practices Recommendations & Principles for addressing Electronic Document Production. [7] Each of The Sedona Principles relate to producing electronically stored information in the event of litigation or anticipated litigation. The responses to the survey question above indicate that in many manufacturing organizations, e-mail policy is set by the IT manager. The IT manager is someone who is likely to have technical expertise, but unlikely to have a thorough understanding of issues related to electronic document production. This response was the first indicator in the research project that pointed to a possible lack of technical expertise on the part of corporate counsel.

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[3] Andrew Conry-Murray (June 23, 2008). IT Fought the Law…; Failure to Manage e-mail can cost millions in court. Archiving technology in tandem with a policy framework can pay dividends in the legal realm and beyond. This article describes the rise of e-mail archiving software and why companies are choosing to mitigate their risk with sophisticated systems.

[4] Standard and Poor's is a provider of independent credit ratings, indices, and investment research and data. They also provide information on directors and corporate counsel for many publicly traded companies.

[5] Don Dillman, *"Mail and Internet Surveys"* (2nd ed.)(2000). New York: John Wiley & Sons, Inc. The author describes effective techniques for developing and administering surveys conducted via traditional mail and via the Internet. The methodology suggests 5 contacts for the most effective results.

[6] William Dennis, "Raising Response Rates in mail surveys of small business owners: Results of an experiment." *Journal of Small Business Management*, no. 41 (2003): 278-296. Dennis suggests that a pre-notification of the survey does not improve response rates for mail-based surveys.

[7] The principles advocated in The Sedona Principles are the result of the efforts of numerous attorneys, academics, jurists, and consultants, working to understand the current legal environment and address problems in antitrust law, complex litigation, and intellectual property rights. Their recommendations have been vetted, widely discussed, and ultimately published as a resource for those seeking information on electronic discovery.

Analysis of the responses leads to the conclusion that technology professionals have a significant influence in e-mail policy, with legal counsel having less influence and people in business-oriented roles such as a records manager or other managers having even less influence on e-mail policy. While the implementation of an e-mail retention policy involves technical challenges, the business driver of such a policy is risk management. The survey responses seem to indicate that legal counsel may be leaving many of the decisions regarding electronic discovery risk to technology professionals instead of participating in creating the policy.

An equally problematic issue is the likelihood that an IT manager would be aware of the legal obligations, restrictions, and issues related to electronic document retention. For example, when the Supreme Court ruled on May 31, 2005 to reverse the conviction of Arthur Andersen LLP for obstructing an official proceeding by ordering the destruction of documents, the general interpretation of that ruling was that the Court saw no problem with a company carrying out document destruction on a routine basis, as long as there was no improper purpose in the document destruction.[8] Law in this area is changing at a pace that approaches the degree of change in technology. It seems unreasonable that an IT manager should be required to understand the full legal requirements of e-mail retention (such as the 2005 Court ruling) and implement the technical policy to meet those requirements. The retention and document production legal issues, when combined with the complexities of technical infrastructure management, offer two moving targets for the person or team tasked with creating e-mail retention policy.

How do the courts deal with the technical issues of electronic discovery? In some cases judges consult with outside technical experts to interpret requests and offer advice. Federal Magistrate Judge David J. Waxse of the U.S. District Court in Kansas says, "Sometimes you need someone who knows their way around technology, even if it's as simple as knowing who to call." [9] Judges may appoint a special master, someone who is an expert in the systems used in a given case, and designate that person as the custodian of the digital evidence. This practice supports the opinion that there are clearly two types of expertise required to deal with electronic evidence; legal expertise and technical expertise. This type of special advisor has been used in other areas and Rule 702 of the Federal Rules of Evidence provides some guidelines in using experts for technical matters.[10]

Haslam[11]suggests that the IT and legal departments must collaborate in developing retention policies and procedures, but the response from the survey seems to indicate that the majority of the burden of developing the e-mail retention policy is on the IT manager. None of the respondents indicated an outside expert is or should be involved with the e-mail retention policy development.

Another question asked on the survey was, "What type of system do you recommend that the company use to manage e-mail retention?" 46% of the respondents indicated that they do not make specific recommendations for e-mail retention software, and 39% recommended using the e-mail client to manage e-mail retention. Only 7% of the respondents recommend some type of electronic records management software or a paper-based document retention system.

Fed. R. Civ. P. 26(b)(2)(C) and equivalent statutes adopted by state authorities require consideration of the costs of preserving, retrieving, reviewing, and producing electronically stored information. The costs associated with these activities using an e-mail client such as Microsoft Outlook™, Mozilla's Thunderbird™, or any of several other commonly used mail user agents (MUA) may be significantly higher than costs to produce electronic documents using document management software. Without a centralized document management system, an organization could face the task of producing e-mail in response to a litigation request by searching numerous individual electronic mailbox files stored on employee personal computers. Another level of complexity from such a configuration is that e-mail users may tend to keep their e-mail in various places other than their personal computer. A user might save or archive messages to removable media or forward messages to a personal account so they have access to them outside the boundaries of the corporate environment. Not recommending any centralized document management system, or recommending that an organization use an e-mail client to manage e-mail retention seems to be contrary to the advice of those who have experience with electronic discovery. The very low (7%) response of attorneys who recommend any records management software is further evidence that

[8] G.A. Castanias, R.C. Cook, L.K. Fisher, and D.L. Horan, "The Supreme Court's Decision in Arthur Andersen LLP v. United States: An Important Development Regarding the Legal Consequences of Document Retention Policies", (2005). Jones Day. The authors discuss the impact of the Supreme Court's decision and describe how it is likely to affect future litigation.

[9] J. Krouse, "Rockin Out the E-Law", (2008). ABA Journal Vol 94, Issue 7, p48-53. This article presents insights from several federal judges on how to approach electronic discovery and some of their experiences.

[10] Rule 702 of the Federal Rules of Evidence, Testimony by Experts, states: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

[11] Melanie Rodier (June 1, 2008). E-Discovery Headaches; Despite the penalties for inadequate e-discovery capabilities, many firms are still challenged to establish effective programs. Wall Street and Technology. Rodier discusses some possible reasons for legal counsel's lack of willingness to attain outside experts in establishing electronic document retention policies.

corporate counsels may not be providing advice on electronic record retention that is consistent with the current risk environment.

Another question in the survey was, "Do you recommend that the company create and maintain an audit trail for all e-mail message activity?" Of the 90 responses, 16 indicated that the company should create and maintain an audit trail for all e-mail activity and, 74 participants choose "No." This response raises the question, "Why not"? In its original context, the question was designed as a screening device, so that only responders who advised clients to create an audit trail would respond to the follow up question regarding specific audit events. The unexpected proportion of responders suggesting that an audit trail is not necessary reinforces the possibility that legal counsel may not fully understand or have considered the potential problems that could develop in the absence of a reliable audit trail. Other explanations for the response could be related to the cost involved, the technical challenges of maintaining the audit trail, or other issues not delineated in the study.

This survey response is also contradicted by recommendations from O'Neill, Behre, and Nergaard.[12] In their opinion, companies should adopt a records management policy that addresses creation, identification, retention, retrieval, and ultimate disposition or destruction of information stored electronically. The O'Neill recommendation could be implemented without an audit trail, but using software that creates an audit trail automatically would greatly enhance the likelihood that electronic records are being handled properly. An audit trail would also facilitate retrieval in the event of a discovery request, thus reducing the potential cost of litigation. Unfortunately the survey did not delve into the reasons for corporate counsel opting not to recommend an audit trail for e-mail activity. This unexpected response was one of the reasons that the researcher began to question the level of expertise among corporate counsels.

This research project was not designed to develop an understanding of the level of technical expertise of legal counsel, but some of the responses indicated that legal counsel for mid-sized manufacturing companies may be relying on technology experts to develop policies for their companies. Ron Friedman[13] identified a model developed by Thomas Barnett of Sullivan &

Cromwell to address e-discovery issues in litigation. Barnett uses project managers and technical experts to assist company representatives in producing electronic documents. Variations of a model using combinations of technical experts, legal experts, business or organizational managers, and project managers are becoming more popular in addressing e-discovery concerns.

Courts continue to rely on technical experts where e-discovery issues become complex. Federal Magistrate Judge John M. Facciola of the U.S. District Court in Washington, D.C. found that an expert was needed in determining appropriate keywords for an electronic document search in U.S v O'Keefe. Judge Facciola cited the criteria in Rule 702 in his decision and held that the issue was too complicated to consider without expert testimony.[14]

6. Conclusions

As a result of the responses to the survey conducted regarding electronic mail retention policies in mid-sized manufacturing companies, it appears that some attorneys may not be providing advice on e-mail retention that is consistent with the current level of risk and complexity in electronic discovery. The survey responses indicate that attorneys may be relying on technical managers to provide electronic mail retention methods, without incorporating input from legal experts with regard to issues such as an audit trail for e-mail, or a formal electronic records retention software system. With the rapidly changing technical and legal environments, experts in e-discovery are moving toward recommending a team-based approach to managing risk related to electronic document retention. The team members should (at a minimum) consist of legal experts, technical experts, business representatives, and someone with project management skills. Team makeup will vary by industry and by risk levels. If, as the results of this survey suggest, there is a lack of understanding of the layers of complexity in electronic records preservation on the part of legal counsel, then the organization would benefit from engaging a team with diverse skills to develop their electronic records retention policy.

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[12] M. O'Neill, K. Behre, and A. Nergaard, (2007). "New E-Discovery Rules: How Companies Should Prepare." Intellectual Property & Technology Law Journal. Volume 19 No. 2. This article describes the steps companies need to go through to minimize their risk in litigation. The authors draw from their experience and use the Sedona Guidelines for Managing Information and Records in the Electronic Age.

[13] Ron Friedman, "Navigating e-Discovery", (2007, November 30). Lawyers Weekly. Mr. Friedman emphasizes the growing complexity of electronic discovery and discusses the recent changes in approaches to producing electronic documents for litigation.

[14] United States v. O'Keefe, No. 06-249 (D.D.C. Feb. 18, 2008). The indictment charges that the defendant, Michael John O'Keefe, Sr., when employed by the Department of State in Canada, received, quid pro quo, gifts and other benefits from his co-defendant, Sunil Agrawal, for expediting visa requests for employees of Agrawal's company, STS Jewels. The case prompted Federal Magistrate Judge John M. Facciola of the U.S. District Court in Washington, D.C. to rule that an expert was needed in the e-discovery phase of the proceedings because of the complexity of the search criteria.

The research project described here shows that corporate counsels in mid-sized manufacturing companies may be relying on the technical expertise of IT professionals in the organization to develop e-mail retention policies. While these employees likely have the best knowledge of the business computing environment and system architecture of the e-mail system, they are not likely to be well versed in the legal implications of e-mail retention and the associated risks inherent in e-mail communication. Courts on all levels rely on technical experts in complex e-discovery situations. These experts are knowledgeable in the operation of computer systems and the rules of discovery. Finding the right expert for advice in developing an e-mail policy may present challenges as well. Krouse[15] maintains that there are no standards for who is an expert in computer forensics, but there are numerous amateur detectives offering services in e-discovery cases.

The responsibility of advising a manufacturing firm in legal matters requires counsel to be aware of legal issues in areas such as regulatory compliance, product liability, employment law, and in some cases international trade regulations. The breadth knowledge required often causes corporate counsel to bring in specialists in specific areas of law from within their firm or from an external firm. The issue of technical savvy for corporate counsel is not necessarily how well they understand technical issues, but how well do they understand their limits to interpreting legal issues and technical issues in a complex environment. Just as a corporate counsel might bring in an expert attorney in employment law to defend a wrongful termination lawsuit, the corporate counsel should consider bringing in an expert in electronic record retention when developing an e-mail retention policy.

[15] J. Krouse, (2006). "In search of E-Expertise". ABA Journal. Volume 92, Issue 11. This article discusses some of the issues in finding an expert to navigate the technical complexities in e-discovery. The author points out that finding someone who is knowledgeable and capable of retrieving and analyzing electronic data is challenging because there are no standards for who is an expert in computer forensics.